Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Petition of Rural Cellular Association	)	RM-11497
for Rulemaking Regarding Exclusivity	)	DA 08-2278
Arrangements Between Commercial Wireless	)	
Carriers and Handset Manufacturers	)	

To: The Commission

COMMENTS OF SPRINT NEXTEL CORPORATION

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SUMMARY

Sprint disagrees with the Rural Cellular Association ("RCA") that handset exclusivity has anticompetitive effects and is against the public interest. On the contrary, handset exclusivity promotes competition among carriers and manufacturers and results in innovative products that benefit the American mobile phone market. The competitive pressure created by the Apple iPhone and the exclusive arrangement with AT&T Mobility, for example, led other carriers to develop new competing products. Sprint worked with Samsung to develop a dynamic new device – the Samsung Instinct and Verizon Wireless introduced the Blackberry Storm. Moreover, without exclusive arrangements, Sprint could not have risked the investment necessary to develop and promote the Instinct. Handset exclusivity, therefore, fosters innovation and serves to protect carriers and manufacturers that make the investments and take the risks that bring innovative products to market.

Sprint further disagrees with RCA that consumers who buy exclusive handsets are harmed. Consumers who choose an exclusive device from a particular carrier do so against the backdrop of multiple other handset, price and service offerings from that carrier and its competitors. Likewise, there is no evidence that consumers who cannot buy exclusive handsets from a particular service provider are harmed. Exclusivity is typically limited in duration and there is no evidence that customers of rural carriers do not have access to a wide array of devices including those with the latest features such as touch-screens and keyboards.

There is also no evidence that rural carriers are harmed by handset exclusivity contracts. RCA's objection appears to be that its members cannot obtain volume discounts or early access to particular devices. The existence of volume discounts, however, is not evidence of a market failure or even unique to telecommunications. RCA carriers have access to over 30 companies designing and manufacturing handsets in the United States. As such, rural carriers can explore a plethora of arrangements with handset manufacturers and nothing prevents these carriers from pooling resources to gain efficiencies and to obtain the latest, greatest handsets at discount prices.

Finally, the RCA petition is procedurally defective because it fails to identify the text or substance of any new or amended rule, and it does not explain how the interests of RCA or its members are affected. In short, there are no specific rules upon which parties can comment. Furthermore, it is questionable whether the Federal Communications Commission has a legal basis for regulating the contractual relationship between wireless carriers and handset manufacturers. Sections 201 and 202 do not apply to equipment supply contracts between carriers and manufacturers, because those contracts do not pertain to common carrier communications services. Customer Premises Equipment ("CPE") is clearly not a common carrier service subject to Title II; moreover, CPE manufacturers are not common carriers subject to Section 201 and 202.

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Sprint Nextel Corporation ("Sprint") submits these comments in response to the Federal Communication Commission's ("FCC" or "Commission") public notice seeking comment on the petition for rulemaking filed by the Rural Cellular Association ("RCA").[1] RCA asks the FCC to initiate a rulemaking to investigate the alleged anticompetitive effects of exclusivity arrangements between commercial wireless carriers and handset manufacturers and, as necessary, adopt rules that prohibit such arrangements when contrary to the public interest.[2] For the reasons discussed below, the petition should be denied.

DISCUSSION

Section 1.401 of the Commission's rules requires that petitions for rulemaking "shall set forth the text or substance of the proposed rule [or] amendment . . . together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests

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[1] *Public Notice*, "Wireless Telecommunications Bureau Seeks Comment on Petition for Rulemaking Regarding Exclusivity Arrangements between Commercial Wireless Carriers and Handset Manufacturers," DA 08-2278 (Oct. 10, 2008) ("*Public Notice*"), *summarized*, 73 Fed. Reg. 63125 (Oct. 25, 2008).

[2] *See* Rural Cellular Association, Petition for Rulemaking Regarding Exclusivity Arrangements Between Commercial Wireless Carriers and Handset Manufacturers, RM-11497 (May 20, 2008) ("RCA Pet.").

of petitioner will be affected."[3] As a threshold matter, the RCA petition is procedurally defective because it does not include the text or substance of any proposed rule or indicate how RCA's interests are affected. On the merits, the petition fails to present arguments, facts or data sufficient to warrant an investigation or the adoption of rules. Accordingly, the petition should be denied.

I. THE PETITION IS PROCEDURALLY DEFECTIVE

The petition fails to set forth either the text or the substance of any proposed new or amended rules. Even a liberal read of these threshold requirements necessitates that the petitioner at the very least "identify[y] the specific rules proposed to be changed, detail[] the nature of those changes, and explain[] their purposes."[4] Here, RCA has not identified any rule(s) it seeks to add or modify or what the new rules would look like. To the contrary, its petition asks the Commission to "investigate" whether there is a problem and only adopt rules "as necessary."[5] Accordingly, in the absence of a more specific proposal on which interested parties can comment, RCA has not met its burden of showing a rulemaking should be conducted.[6]

Moreover, it is not clear how RCA and its members are affected. RCA states that the ability of smaller carriers to effectively compete with the product and service offerings of the largest wireless carriers "is significantly and unfairly diminished due to their limited handset selection," and thus the time is now "to protect . . . smaller competitors from these ongoing

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[3] 47 C.F.R. § 1.401(c).

[4] *See In re Petition for Rule Making filed by Icom America, Inc.*, 22 FCC Rcd 13577, n.19 (WTB/MD 2007).

[5] *See* RCA Pet. at 1.

[6] *See, e.g., Rules Pertaining to the National Exchange Carrier Association*, 2 FCC Rcd 1, ¶ 12 & n.28 (1987); *In re Dale E. Reich; Petition for Rule Making*, 19 FCC Rcd 23216, 23217, 23217 (WTB/PSCID2004) ("The petition also is procedurally defective. Specifically, [the petitioner] does not provide the text for his several proposed modifications to the . . . rule Parts listed in his petition, and the substance of changes he requests is not consistently or clearly stated.").

harms."[7] No actual evidence (market studies, economic data, expert reports, consumer analyses, etc.) to support these claims is submitted.[8] Indeed, despite its claim that "few, if any, small, rural providers can provide the variety of handsets and handset features offered by the Big 5," RCA's acknowledgement that "most small, rural providers might offer wireless packages that 'they feel are competitive with those offered by nationwide providers'" begs the question of whether small carriers are actually harmed.[9] Merely stating something "does not make it so."[10]

Accordingly, because the petition fails to identify the text or substance of any new or amended rule, and does not explain how the interests of RCA or its members are affected, it should be denied.[11] Even assuming *arguendo* that the petition did not suffer from these fatal defects, however, there is no factual or legal basis for conducting an inquiry.

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[7] *See* RCA Pet. at ii, 3-4, 12-13.

[8] *See, e.g., Amendment of Parts 76 and 78 of the Commission's Rules to Adopt General Citizenship Requirements for Operation of Cable Television Systems*, F.C.C.2d 73, 73 n.1 (1980) ("specific economic or other interests" should be identified as required by the rule). For example, RCA fails to show that the large carriers even have market power in the areas served by its members, such that the large carriers can, through exclusivity deals, affect the ability of smaller carriers to effectively compete in those areas.

[9] *See* RCA Pet. at 4 n.6 (quoting *Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, Twelfth Report*, 23 FCC Rcd 2241, ¶ 188 (2008) ("*CMRS Competition 12th Report*"). While the petition highlights Vermont as one of the areas served by smaller companies, *see* RCA Pet. at i, 7, RCA's website indicates that it has no members in Vermont, *see* <http://americanroamer.com/rca/rca_members.html>, visited Nov. 20, 2008 (indicating that Vermont "has no RCA member licenses").

[10] *American Council on Education v. FCC & USA*, 451 F.3d 226 (D.C. Cir. 2006).

[11] Erroneous references in the Federal Register notice seeking comment on the petition to FCC rules governing rulemakings and a "[p]roposed rule," *see* 73 FR 63125, do not convert the *Public Notice* into an *Notice of Proposed Rulemaking*. As noted, there is no FCC proposed rule or even the proposed subject matter for a rule, and therefore no meaningful comments can be made regarding any rule. *See* 5 U.S.C. § 553(b)(3) (a *Notice of Proposed Rulemaking* "shall" include "the terms or substance of the proposed rule or a description of the subjects and issues involved"); *see also Home Box Office, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977) ("[A]n agency proposing informal rulemaking has an obligation to make its views known to the public in a *concrete* and *focused* form so as to make criticism or formulation of alternatives possible.") (emphasis added).

II. THE PETITION FAILS TO PRESENT FACTS OR ARGUMENTS THAT WARRANT AN INVESTIGATION OR THE ADOPTION OF RULES

As shown herein, there is no basis for conducting an inquiry. The Petition assumes a problem exists, yet RCA has not supplied evidence to the Commission to support its contention that consumers or small carriers are actually harmed by handset exclusivity contracts. To the contrary, handset exclusivity arrangements can be pro-competitive, facilitating facilities-based competition among wireless operators. Even assuming *arguendo* there were a problem, none of RCA's legal theories provide a legal basis for regulation of handset exclusivity contracts. For all these reasons, the petition should be denied.[12]

A. There is No Evidence of a Problem and Handset Exclusivity Contracts Can Be Pro-Competitive

RCA asserts, without any supporting evidence or analysis, that equipment exclusivity deals are both anticompetitive and contrary to the public interest. The petition identifies three groups allegedly harmed by handset exclusivity arrangements: (1) consumers who buy handsets under such arrangements;[13] (2) consumers who cannot buy exclusive handsets because of such arrangements;[14] and (3) rural carriers which cannot obtain the handsets that are exclusive to major carriers.[15] RCA's arguments about the supposed harm to consumers and small carriers from handset exclusivity arrangements are baseless, as there is no evidence of market failure in

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[12] *Rules Pertaining to the National Exchange Carrier Association*, 2 FCC Rcd 1, ¶ 12 & n.18 (1987) ("In the absence of more specific, substantiated allegations . . . we believe that a rulemaking proceeding is unnecessary."); *see also Newark, NJ*, 29 Rad. Reg. 2d 1473 (1974) (dismissing a petition for rule making because it failed to set forth sufficient supportive material to establish how the public interest would be served).

[13] RCA Pet. at 2.

[14] *Id.* at 3.

[15] *Id.* at 3-4.

the record that requires correction or government intervention. To the contrary, the relevant markets are competitive and producing innovation that benefits the public.

1. There Is No Evidence Consumers Who Buy Exclusive Handsets Are Harmed

The petition makes the unsubstantiated claim that consumers who buy handsets that are exclusive to a particular large carrier are harmed because the carrier has "monopolistic control" over the handset; as a result, these consumers must pay higher prices for services and accessories, pay a premium price for the handset, and accept restrictive terms of service, all due to the alleged lack of competition.[16] Customers who buy handsets from operators with exclusive contracts are not harmed, however, because they have many handsets to choose from – both through the operator and from other vendors.

In order to assess potential anticompetitive effects – and whether a carrier has monopolistic control – it is necessary to define the relevant product market.[17] The Commission has recently cautioned that given the "substantial ongoing developments in the evolution of the provision of wireless services," it is import not to define the relevant product market too narrowly.[18] Thus, no single handset is a relevant product market unto itself, and consumers have an incredible array of wireless devices to choose among. For example, CTIA has noted that the handset market in the United States is "extremely robust," with the number and variety of handsets available to consumers described as "nothing short of amazing."[19] This includes more

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[16] *See id.* at 2.

[17] *See, e.g., In re SBC Communications Inc. and AT&T Corp.*, 20 FCC Rcd 18290, 18303-04 (2005).

[18] *See, e.g., In re Sprint Nextel Corporation and Clearwire Corporation*, WT Docket No. 08-94, FCC 08-259, ¶¶ 26-39 (finding that "there are risks associated with defining product markets too narrowly in the context of rapidly evolving markets and services such as those for mobile broadband services").

[19] *See* CTIA, *Ex Parte* Communication, WT Docket No. 08-27, at 1 (Mar. 20, 2008).

than 620 unique wireless devices that are available for sale to consumers in the United States, with at least 35 companies designing and making handsets for the U.S. marketplace.[20] These handsets are available from many sources, ranging from large nationwide electronics stores to independent retailers and carrier web sites, and include many features, including digital cameras, GPS-enabled devices, personal health features and touch-screens.[21]

Thus, consumers choosing to select an exclusive device from a particular carrier and subject to that carrier's terms of service are able to do so against the backdrop of multiple other handset, price and service offerings from that carrier and its competitors. And while a particular exclusive handset may have a certain unique combination of features when initially offered and for which consumers are willing to pay a premium, if those features are popular they inevitably will lead to competitive offerings – and further consumer choice – from other carriers and manufacturers. For example, Apple's touch screen iPhone offered by AT&T has led to the development of competitive models from multiple vendors, such as the Samsung Instinct offered by Sprint[22] and the Blackberry Storm offered by Verizon.[23] This is the essence of a competitive market at work, not evidence of market failure.

Customers also recognize that new product introductions often involve a premium price – a fact not unique to wireless handsets or to situations involving exclusivity. Early adopters may be willing to pay the price, or stand in line, for a particular product when it is new on the market. Others choose to wait until the price comes down over time, or purchase an alternative. Nobody was forced to buy a Motorola RAZR or Apple iPhone at the introductory price. Moreover, most new, exclusive handsets offered by wireless operators are almost always available at a subsidized

[20] *Id.*

[21] *Id.* at 1-2.

[22] *See* < http://www.instinctthephone.com/ >.

[23] *See* <http://estore.vzwshop.com/storm/>.

price to customers willing to enter into a one- or two-year contract. Any given operator's pricing for exclusive handsets is also constrained by other operators' pricing of existing or planned alternatives in development.

Finally, the terms of service offered by wireless carriers are not typically dependent on the particular model of handset that will be used, unless the handset requires a particular type of service not applicable to other handsets, such as video service or Blackberry data service. Thus, customers unhappy with the terms of service offered in connection with an exclusive device can take their business to another carrier to obtain a service offering that would better meet their needs. While the particular handset may not be available elsewhere, they may find a different handset but with a superior service plan that, on balance, they like better. For example, Sprint offers a "Simply Everything" flat rate plan that gives users unlimited access to voice and data functionalities, so customers can freely use all of the features their phones offer.[24] Because wireless carriers compete with each other with respect to terms of service, consumers who *choose* to purchase an exclusive device are not *forced* to accept particular terms of service – they have many options before them.

2. There Is No Evidence Consumers Who Cannot Buy Exclusive Handsets Are Harmed

The petition claims that consumers in rural areas are harmed because they cannot buy handsets that are exclusive to carriers who are not present in their rural areas.[25] Customers who are not within the territory served by a given wireless operator and thus cannot buy a handset and service from that operator are not harmed by that operator's exclusive handset arrangements, however, because there are *many other* handsets available from other sources, including wireless

[24] *See* < http://newsreleases.sprint.com/phoenix.zhtml?c=127149&p=irol-newsArticle_newsroom&ID=1113525 >.

[25] *See* RCA Pet. at 3.

operators and other vendors. While all 620 devices referenced above are obviously not available in a given area, RCA provides no evidence of any relevant geographic markets where insufficient consumer choice with respect to handsets, pricing, or service exists.

In fact, exclusivity arrangements are generally limited in duration and thus do not prevent customers from obtaining their desired handsets from an alternative service provider at a later date. For example, the RAZR was initially marketed through an exclusive arrangement with Cingular Wireless (now AT&T) in late 2004/early 2005 at a cost of $499.[26] Within a year (late 2005), however, Motorola released a CDMA version of the RAZR for both large *and smaller* carriers, including Verizon Wireless, Cricket Communications, US Cellular and ALLTEL, and a year later Sprint started selling RAZRs as well.[27] Today, some RAZR models are available for well under $100 or even free depending on the carrier and plan selected and rebates that may be available.[28] Moreover, an examination of the websites for some smaller, regional wireless operators confirms that the largest operators' exclusivity deals do not prevent smaller operators from offering a wide array of handsets at all price points, including smartphones with the latest features, such as touchscreens and keyboards.[29]

RCA's complaint that consumers are harmed when carriers with exclusive handset deals do not sell to customers outside their service areas illustrates the illogical nature of its petition. If major carriers did sell phones and service to customers living outside their service area, the rural cellular carriers RCA represents would suffer more competitive harm than they do now. The iPhone, for example, has not taken market share away from rural carriers where AT&T does not

[26] *See* <http://www.entrepreneur.com/tradejournals/article/126238348.html>.

[27] *See* <http://en.wikipedia.org/wiki/Motorola_RAZR_V3>.

[28] *See* <http://www.younevercall.com/razr-phones.htm>.

[29] *See* <http://www.centennialwireless.com/shopping/shop_phones.php> and <http://www.uscc.com/uscellular/SilverStream/Pages/b_showphone.html?zip=05201&mkt=605940&tm=0>.

provide service; if anything, it has taken market share away from the larger nationwide carriers with which it competes in a given market.

3. There Is No Evidence Rural Carriers Are Harmed by Handset Exclusivity Contracts

The petition also claims that major carriers with handset exclusivity deals have an unfair advantage over smaller rural competitors who do not have access to high-end exclusive handsets and also cannot get the same volume discounts as major carriers.[30] There is nothing unfair or anticompetitive about volume discounts being available to large-volume purchasers. RCA's true reason for objecting to handset exclusivity is not consumer welfare, but the fact that its members – small rural wireless operators – allegedly do not have early access to the trendiest handsets and cannot get the volume discounts available to high-volume purchasers.

As a threshold matter, these are not issues unique to wireless handsets. Volume discounts are common in many industries. The fact that national carriers may obtain exclusive rights to handsets is the result of their access to a large customer base, just as major national retailers of other goods (*e.g.,* Wal-Mart, Best Buy, Bed Bath & Beyond) are more likely to be able to strike advantageous deals with vendors, often exclusive in nature, than small local stores.

Furthermore, the handset business is extremely competitive at the wholesale level, not an oligopoly. As noted, there are at least 35 companies designing and manufacturing handsets for the U.S. market, giving all carriers, large and small, access to many handset options.[31] RCA claims without support that its members encounter "significant obstacles" in attempting to

[30] RCA Pet. at 3-4.

[31] In fact, Apple's entry into the handset market shows the value exclusive contracts can provide. Furthermore, U.S. carriers compete not only with each other but with carriers and retail vendors around the globe for exclusive rights to new handsets.

provide popular handsets by two manufacturers, Samsung and LG.[32] But it says nothing about member obstacles negotiating handset deals with the other 33 companies that are making handsets for the U.S. markets. Nor does it indicate the nature of these "obstacles" to ascertain whether they are related solely to insufficient scale to negotiate volume discounts or other factors. RCA similarly claims that the only handsets made available to RCA members are "basic, low-end handsets without many of the cutting-edge features members covet,"[33] but a web site search for some smaller wireless operators indicates that they are indeed offering a wide array of handsets including, as noted above, smartphones with the latest features, such as touch-screens and keyboards.[34]

Even if small carriers acting alone lack the volume purchasing power to get early access to the trendiest handsets, there is nothing preventing them – perhaps through RCA – from pooling their resources and purchasing power to negotiate their agreements with manufacturers for unique handsets. This is not a novel concept. Several years ago, the Associated Carrier Group ("ACG"), made up of small or rural Tier II and III CDMA carriers, worked in concert to make themselves an attractive development partner to the manufacturer of a "smart" phone. As a result, they were first to market in 2005 with the Kyocera Slider Remix KX5 music phone, a digital music player smart phone.[35] As one analyst at the time noted, "Small operators may not have the buying power of Tier 1 carriers, but by working together and developing innovative purchasing strategies, they are getting access to state-of-the-art devices in the same timeframe as

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[32] *Id.* at 3.

[33] *Id.*

[34] *See* <http://www.centennialwireless.com/shopping/shop_phones.php> and <http://www.uscc.com/uscellular/SilverStream/Pages/b_showphone.html?zip=05201&mkt=605940&tm=0>.

[35] *See* <http://www.kyocera-wireless.com/slider-remix-phone/>.

their Tier 1 counterparts."[36] In sum, RCA offers no reason why it or its members cannot avail themselves of similar opportunities – and certainly no *evidence* of anticompetitive harm suffered by its members due to exclusivity contracts.

4. Handset Exclusivity Contracts Can Produce Important Benefits to Consumers

Contrary to RCA's assertions, equipment exclusivity arrangements can and do serve the public interest. Handset exclusivity has led to intensive development of innovative handsets. For example, the Apple iPhone was introduced by a newcomer to the business through an exclusive arrangement with AT&T, and has prompted other carriers to come up with their own exclusive deals for slick touchscreen internet-phones to compete – thus spurring competition and further innovation.

In particular, Sprint worked with Samsung to develop the Instinct and special service plans that provide a competitive alternative to iPhone with different features at a lower price. The device was created through innovation made possible by Sprint's exclusive contract with Samsung. That arrangement allowed Sprint and Samsung, working together, to create a device that would benefit both the vendor and carrier in about half the normal time to bring a product to market. In developing the Instinct, Sprint was cognizant of the iPhone example and wanted to create a competing product that would also offer advantages exclusive to the Sprint network and that would appeal to customers with high data usage.[37] The uniqueness of the device and speed

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[36] Sue Marek, *Operators Collaborate on Exclusive Devices*, Wireless Week, Nov. 1, 2005, *available at* <http://www.wirelessweek.com/article.aspx?id=82278>.

[37] The result is a wireless device which offers consumers full touch-screen functionality with fast speeds. The touch-screen phone brings the customer's most-used applications and contacts within a single finger tap, but also provides access to Sprint exclusive services and multimedia content, including: GPS-enabled driving directions, directory information, live and on-demand programming, including, the industry's only made-for-mobile sports and entertainment video programming network, Sprint Music Store, up-to-date information on sports, weather, news, movie showtimes and other options customized to the user's zip code.

to market (10 months) were made possible because of the exclusive contract with Samsung. Sprint then coupled the Instinct with its "Simply Everything" plan to enhance the competitiveness of its offering in the marketplace.

Handset exclusivity thus serves to protect Sprint's investment in the development of the Instinct as well as the millions of dollars that Sprint spent to advertise and promote the Instinct device. With regard to protecting its investment in the development of the Instinct, Sprint dedicated labor – over 200 employees and contractors worked on the Instinct – and resources to develop a groundbreaking user interface design for the Instinct. Handset exclusivity ensures that Sprint's investment in this device is not handed over to its competitors. Additionally, Sprint spent a large percentage of its 2009 advertising budget – again, in the millions of dollars – to promote the Instinct device. Without handset exclusivity, Sprint would not have spent so much to promote the Instinct if months later the Instinct could be sold by a competitor.

As the Instinct example shows, exclusivity contracts are important to operators' ability to compete because they enable operators to target particular users based on features and functions. In a competitive environment, each participant seeks to differentiate its offering from others. There are many aspects of such differentiation, including price, quality, service plans, and handsets. Removing *any* basis on which operators can differentiate themselves diminishes competition and injures consumers. As differentiating points are removed, wireless service would become commodity-like, giving an advantage to the largest providers with the greatest economies of scale, and thus lessening the ability of smaller providers to compete.

Indeed, there is the very real risk that if the FCC were to prohibit handset exclusivity contracts, it would stifle the innovation that has resulted. Developing and manufacturing new devices is a long and costly process and one that requires good branding and marketing to develop market share and sales. Vendors are attracted to exclusivity contracts because they

commit the carrier for a certain period of time to promoting the device. In other words, unlike multi-carrier equipment sales, the vendor and carrier in an exclusive contract are both equally vested in promoting the handset. In some cases, the common interest is enhanced through revenue sharing arrangements pursuant to which manufacturers are sharing in revenue from customer data plans, not just number of units sold.[38] The resulting leverage enables manufacturers to fund costly efforts to develop novel devices. All of this innovation would be placed at risk if handset exclusivity arrangements were to be prohibited, as called for by RCA.

B. The FCC Has No Legal Basis for Regulation of Wireless Vendor-Operator Contracts

Assuming there was a problem, RCA offers several legal theories to justify regulatory intervention into the marketplace. As discussed below, there is no legal basis for regulation of wireless vendor-operator contracts.

1. RCA's Title II Analysis Is Meritless

RCA claims that Sections 201 and 202 of Title II of the Communications Act (the "Act") make handset exclusivity deals unlawful.[39] Section 201(b) of the Act requires that all charges for interstate or foreign common carrier communication services be "just and reasonable," and Section 202(a) requires that "any common carrier" refrain from "unjust or unreasonable discrimination in . . . practices . . . or services for or in connection with like communication service."[40] RCA's Title II analysis lacks merit for several reasons.

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[38] *See, e.g., Thomas Ricker, Nokia, Like Apple, Will Seek Its Slice of the Revenue Sharing Pie*, Engadget, Dec. 11, 2007, *available at* <http://www.engadget.com/2007/12/11/nokia-like-apple-will-seek-its-slice-of-the-revenue-sharing-pi/>.

[39] *See* RCA Pet. at 10-11.

[40] 47 U.S.C. §§ 201(b), 202(a).

First, Sections 201 and 202 apply only to communication services by common carriers.[41] Wireless handsets are considered "customer premises equipment," or CPE,[42] and the Commission's *Computer II* proceeding made clear that CPE is not a common carrier service subject to Title II.[43] Moreover, CPE manufacturers are not common carriers,[44] and are therefore not subject to Sections 201 and 202. Thus, Sections 201 and 202 do not apply to contracts between carriers and manufacturers for the purchase and sale of handsets because they do not pertain to common carrier communication services.

Second, exclusive handset deals do not result in any unjust or unreasonable practice in connection with the provision of communication service, and thus would not violate Section 201(b) even if it applied. A contract between a carrier and an equipment manufacturer is an equipment supply contract, not a practice "in connection with" communication service. Moreover, such contracts, in any event, are reasonable, because they result in bringing new and innovative equipment and services to market.

Third, for there to be unjust or unreasonable discrimination in violation of Section 202, there must be discrimination by a carrier between or among its customers in connection with the

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[41] 47 U.S.C. §§ 201(b), 202(a); *see also Federal-State Joint Board on Universal Service*, 17 FCC Rcd 24952, n.111 (2002) ("[S]ections 201 and 202 of the Act only apply to 'common carriers' . . . .").

[42] *See, e.g., Federal-State Joint Board on Universal Service*, 18 FCC Rcd 10958, 10967 (2003) ("[T]he Commission . . . has generally treated wireless handsets . . . as Customer Premises Equipment (CPE) . . . .") (citing *Bundling of Cellular Customer Premises Equipment and Cellular Service*, 7 FCC Rcd 4028, ¶ 9 (1992)); *Implementation of Section 255 of the Telecommunications Act of 1996; Access to Telecommunications Services, Telecommunications Equipment, and Customer Premises Equipment by Persons with Disabilities*, 13 FCC Rcd 20391, 20416 n.107 (1998) ("CPE may also include wireless handsets.").

[43] *Implementation of Sections 255 and 251(a)(2) of the Communications Act*, 16 FCC Rcd 6417, 6456 (1999) (describing the Commission's *Computer II* proceeding, as upheld by the Court of Appeals for the D.C. Circuit, which found that "the provision of . . . CPE were not common carrier activities within the scope of Title II regulation") (citing *Computer II* precedent).

[44] Common carriers are persons "engaged" in "communication by wire or radio" for hire, *see* 47 U.S.C. § 153(10), and not persons who make equipment used by common carriers.

provision of like communication services.[45] The "discrimination" of which RCA appears to complain, however, has nothing to do with a carrier treating its customers differently with respect to communications services. Rather, it is the fact that the exclusive handset deal prevents the handset *manufacturer* from selling that handset to other retail vendors, including other wireless carriers. This is not carrier "discrimination" for purposes of Section 202. Even if Section 202(a) applied, a wireless operator is not discriminating among its customers when it enters into an exclusive contract for a handset. Its customers can all get the handset. Refusing to sell the handset to persons who live where the operator does not provide service is not discrimination among customers and is entirely reasonable.

Finally, RCA makes a subsidiary argument that handset exclusivity deals somehow endanger universal service, conflicting with Section 254(b)(3) of the Act, by favoring urban areas over rural areas. That section states that consumers in all areas of the Nation "should have access to telecommunications and information services."[46] Yet, handsets are CPE, or telecommunications *equipment*, not telecommunications and information *services*, so this section is inapplicable. Furthermore, exclusive *equipment* contracts, even assuming they were limited to urban areas (which is plainly not the case), have nothing to do with the availability of telecommunications and information *services* in rural areas. What services are available in rural areas is dependent entirely on which carriers have spectrum those areas and are operating there, and what the carriers serving those rural areas choose to offer. If wireless broadband service is not available in a particular rural area, that is a consequence of the rural operator's spectrum

[45] *In re Bruce Gilmore, et al.*, 20 FCC Rcd 15079, 15086-97 (2005) ("Section 202(a) of the Act makes it unlawful for any common carrier to discriminate unjustly or unreasonably among customers in its provision of 'like communications service.'") (citing *Orloff v. Vodafone Airtouch*, 17 FCC Rcd 8987, 8994 (2002), *aff'd, Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003)).

[46] 47 U.S.C. § 254(b)(3).

holdings or business decisions – not the fact that a particular model of handset cannot be provided in that area.

2. RCA Distorts the Communications Act in an Unsuccessful Attempt to Create a "Service Equity" Requirement

The petition claims that Sections 1 and 307 of the Act create a "service equity" requirement with respect to geographical areas nationwide, and that major carrier handset exclusivity deals are at odds with the notion of nationwide service, especially in rural areas.[47] These claims distort the language of the statute and thus fail for several reasons.

First, RCA's attempt to create a geographic "service equity" requirement out of Section 1's "without discrimination" phrase omits to mention that that phrase reads, in context, as follows:

> For the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination *on the basis of race, color, religion, national origin, or sex*, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service . . . there is created a commission to be known as the "Federal Communications Commission". . . .[48]

Thus, Section 1 addresses only discrimination on the basis of race, color, religion, national origin, or sex – and not the geographic location where particular equipment is offered.

Second, RCA's attempt to create a geographic "service equity" requirement out of Section 307(b)'s language about "fair, efficient, and equitable distribution" of facilities also fails. Section 307(b) states that:

> In considering applications for licenses, and modifications and renewals thereof, . . . the Commission shall make such distribution of *licenses, frequencies, hours of operation, and of power* among

[47] *See* RCA Pet. at 5-6.

[48] 47 U.S.C. § 151 (emphasis added).

> the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.[49]

Plainly, the distribution of "licenses, frequencies, hours of operation, and of power" does not include handsets. The Commission also has long recognized that Section 307(b) was enacted to govern broadcast services and has expressly declined to apply it to common carrier mobile services;[50] therefore, the satellite broadcasting precedents cited by RCA are irrelevant.[51] And Section 307(b) addresses radio service, not CPE, so it is inapplicable to handsets on that ground as well. In any event, the Commission has made essentially the same amount of radio spectrum available for wireless service nationwide, ensuring that wireless coverage can be provided anywhere that a wireless operator is willing to build out.[52] As the Commission's annual CMRS reports demonstrate, the vast majority of Americans have access to multiple providers,[53] so the objective in Section 307(b) has been taken into account.

Finally, RCA's argument that the unavailability of some handsets in some rural areas creates a "digital divide" is pure rhetoric.[54] Rural carriers have the ability to offer wireless voice and data services and their customers can buy a wide range of 2G and 3G handsets from the carriers or from independent dealers. If wireless broadband *service* is not available in a

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[49] 47 U.S.C. § 307(b) (emphasis added).

[50] *Orange County Radiotelephone Service, Inc.*, 5 F.C.C.2d 848, 850 (1966); *accord, Edward C. Smith, d/b/a AnsweRite Professional Telephone Service,* 68 F.C.C.2d 1473, 1476 (1977).

[51] *See* RCA Pet. at 9-10.

[52] Thus, it has made the same amount of spectrum available for cellular, PCS, AWS, and 700 MHz wireless service in rural and non-rural areas, and the same number of licenses and MHz have been made available for serving remote communities in Vermont, Alaska, or North Dakota as for serving downtown New York or Los Angeles.

[53] Specifically, more than 95 percent of the U.S. population lives in areas with at least three mobile telephone operators competing to offer service, and more than half of the population lives in areas with at least five competing operators. *See CMRS Competition 12th Report*, 23 FCC Rcd at 2245.

[54] *See* RCA Pet. at 8.

particular rural area, that is the consequence of the rural carrier's individual decision not to build out its network and provide service in the area, not the fact that some particular model of handset cannot be used. The availability of a particular handset in a given area is irrelevant and does not create a digital divide.

3. RCA's Other Legal Theories Do Not Support Regulating Handset Exclusivity Contracts

RCA's remaining two legal theories are also without merit. First, contrary to RCA's suggestion, the FCC is not an antitrust enforcement agency[55] and its ancillary authority does not support regulation of licensee contracts with CPE suppliers.[56] In order to exercise ancillary jurisdiction, (i) the handset exclusivity contracts must be covered by the Commission's general grant of jurisdiction under Title I of the Act and (ii) the assertion of jurisdiction over those contracts must be reasonably required to perform an express statutory obligation under Titles II and III of the Act.[57] While the Commission's Title I jurisdiction covers communication by radio, including apparatus incidental thereto,[58] the FCC has no authority to regulate handset contracts which are executed well before the devices are engaged in radio transmission and do not relate to

[55] *Compare, e.g., In re Communications Satellite Corporation*, 97 F.C.C.2d 82, 96 (1984).

[56] *See* RCA Pet. at 11-12. RCA cites Sections 303(r) and 4(i) of the Act as bases for the FCC's exercise of its ancillary jurisdiction to prohibit handset exclusivity contracts. *See id.* at 11. Section 303(r) authorizes the FCC to "make such rules . . . as may be necessary to carry out the provisions of this the Act," 47 U.S.C. § 303(r), and Section 4(i) provides that "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions," 47 U.S.C. § 154(i).

[57] *See American Library Ass'n v. FCC*, 406 F.3d 689, 692-93 (D.C. Cir. 2005); *Sw. Bell Te. Co. v. FCC*, 19 F.3d 1475, 1479 (D.C. Cir. 1994); *Implementation of Sections 255 and 251(a) of the Communications Act*, 16 FCC Rcd 6417, 6456 (1999).

[58] *See* 47 U.S.C. §§ 151, 153(33).

wire or radio communications.[59] Moreover, even if the FCC had such jurisdiction, RCA has neither shown that any regulation is required nor identified any specific Title II or III responsibilities that regulation over equipment supply contracts between a network operator and a manufacturer would carry out.

Second, the three cases cited in the petition in which the FCC prohibited exclusivity arrangements that prevented competition in the provision of telecommunications do not support such action here.[60] All three examples involved contractual arrangements between a communications provider and a property owner that prevented any other competing communications provider from having access to customers on that property, thus giving the provider an actual monopoly in the provision of *service* to those customers.[61] Handset exclusivity deals, however, do not give a carrier a monopoly over the provision of *service* to any customers. Nor do they restrict customers' access to other competing carriers in any respect, force customers to pay higher rates due to a lack of competition, or reduce quality or innovation.

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[59] *See American Library*, 406 F.3d at 708 ("[T]he FCC has no authority to regulate consumer electronic devices that can be used for receipt of wire or radio communication *when those devices are not engaged in the process of radio or wire transmission.*") (emphasis added).

[60] *See* RCA Pet. at 13-14.

[61] *See Promotion of Competitive Networks in Local Telecommunications Markets*, 15 FCC Rcd 22983 (2000); *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units*, 22 FCC Rcd. 20235 (2007); *Promotion of Competitive Networks in Local Telecommunications Markets*, WT Docket No. 99-217 (rel. Mar. 21, 2008).

CONCLUSION

For the foregoing reasons, the petition for rulemaking filed by the RCA seeking to prohibit handset exclusivity contracts is without merit and should be denied.

Respectfully submitted,

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